Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD DAVIS,
Petitioner,

versus

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEAL
FOR THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL TORT CLAIMS ACT ALLOWS A CLAIM FOR NEGLIGENCE AGAINST THE UNITED STATES OF AMERICA FOR HIRING AN INDEPENDENT- CONTRACTOR AND THEN LIMITING THE INDEPENDENT CONTRACTOR'S ABILITY TO SAFELY PERFORM ITS CONTRACTED DUTIES BY REFUSING TO AUTHORIZE THE REPLACEMENT OF A DEFECTIVE PART AT THE UNITED STATES' COST?

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OPINIONS BELOW

The unpublished opinion and judgment of the Fifth Circuit Court of Appeals for the United States of America dated September 23, 2003, affirming the judgment of the trial court. *Davis v. U.S.*, 75 Fed.Appx. 957, 2003 WL 22204138 (5th Cir.(La.) 2003)

The judgment of the United States District Court for the Eastern District of Louisiana dated January 6, 2003, granting summary judgment in favor of Respondent.

The unpublished order and reasons of the United States District Court for the Eastern District of Louisiana dated January 2, 2003, granting summary judgment in favor of Respondent, *Davis v. U.S.*, 2003 WL 30421 (E.D. La. 2003)

STATEMENT OF JURISDICTION

(i) The judgment sought to be reviewed was rendered by the Fifth Circuit Court of Appeal for the United States of America on September 23, 2003.

(ii) The court has jurisdiction to review the judgment in question pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

It is provided in the Constitution that "[t]he judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ... to Controversies to which the United States shall be a Party". U.S. Const. art. III, § 2.

The Petitioner's original claim arose out of the Federal Tort Claims Act 28 U.S.C. § 2674 which provides in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Therefore, Federal Question Jurisdiction existed:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331

Jurisdiction in federal courts was exclusive as mandated in 28 U.S.C. § 1346 which provides in part:

> (b)(1) Subject to the provisions of chapter 171 of this title, the district courts, ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

(i) BASIS OF ORIGINAL JURISDICTION

The petitioner originally filed an administrative claim pursuant to 28 U.S.C. § 2675 and upon the failure of the parties to resolve the matter, a lawsuit was filed in the United States District Court for the Eastern District of Louisiana pursuant to 26 U.S.C. §1346(b).

(ii) STATEMENT OF THE FACTS

The petitioner, Ronald Davis, was employed by Fleet Tire Service, Inc. as a tire repairman. Fleet Tire was hired by civilian Navy employees working in the maintenance department at the United States Naval Air Station in Belle Chasse, Louisiana. The Navy employees requested Fleet to remove four relatively new tires from a crash truck (a fire truck used in air operations) and install four old tires before the Navy got rid of the crash truck.

The tires were very large and used a multi-piece rim with a locking ring. The entire wheel was made up of three pieces, a big part which is a solid bottom, a big sleeve that holds the bead of the tire, and then between the two a little locking ring that holds the outer sleeve down.

On January 19, 1995, the Ronald Davis and a co-employee was sent to the Naval Air Station to perform the job. They started the job and had completed two tires when they ran into a problem with the third rim. On this third rim, Ronald Davis determined that the locking ring was defective. The locking ring was ate up from corrosion. It had chips missing out of the part that holds it in place.

The Navy's transportation manager was informed about the defect in the locking ring and that the another rim was needed. The Navy's transportation manager refused to purchase another rim which would have been the normal response to identifying such a defect. The service

manager, after being informed by the plaintiff that the locking ring was bad, told the plaintiff to proceed with the job anyway.

Ronald Davis then called his supervisor at Fleet who also requested Davis to proceed without the purchase of a new rim. The petitioner then attempted to air up the tire. The locking ring exploded off of the tire and struck Davis in the face and head. As a result of the accident, Ronald Davis sustained serious facial and head injuries, which included permanent brain damage.

REASON FOR GRANTING WRIT

THE UNITED STATES OF AMERICA SHOULD BE HELD LIABLE FOR HIRING AN INDEPENDENT CONTRACTOR AND THEN LIMITING THE INDEPENDENT CONTRACTOR'S ABILITY TO SAFELY PERFORM ITS CONTRACTED DUTIES BY REFUSING TO AUTHORIZE THE REPLACEMENT OF A DEFECTIVE PART.

This Court has previously recognized that the Federal Tort Claims Act itself exempts the USA from liability for the negligent acts of employees of independent contractors and that state law can be used in determining whether a particular entity is an independent contractor. *Logue v. United States*, 412 U.S. 521, 526-27, 93 S.Ct. 2215, 2219, 37 L.Ed.2d 121 (1973). However, this Court went further emphasizing the necessity of distinguishing

the negligent acts of the independent contractor and the negligent acts of federal employees. *Id.* 412 U.S. at 532-33, 93 S.Ct. at 2222. The lower courts in the present case focused on the first part of the analysis and failed to consider the consequences of the USA hiring an independent contractor then refusing to provide the necessary equipment within its control to safely perform the contracted tasks. A writ should be granted in this case to clarify the liability of the USA when its employees' acts of negligence are a contributing cause for an accident resulting in injuries.

The Federal Tort Claims Act ("FTCA") limits the United States liability to acts of direct employees of the United States which does not include the acts of independent contractors, 28 U.S.C. § 2671 and that these acts must be negligent and not based on strict liability. Specifically, there cannot be liability based on a theory that the USA retained a non-delegable duty to see that the work was done safely. *Aretz v. United States*, 604 F.2d 417, 426 (5th Cir. 1979).

Liability under the FTCA is applied to the USA by using the same tests of negligence as applies to private individuals under like circumstances under the law of the place where the accident occurred. 28 U.S.C. § 2674; *Rayonier Inc. v. U.S.*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). The accident at issue in the present case occurred in Louisiana. In Louisiana the general rule is that principals are generally not liable for the offenses committed by an independent contractor while performing

its contractual duties. This rule applies to the liability of the principal to an employee of the independent contractor when the employee is injured while performing under the contract such as exists in the present case. *Sandbom v. BASF Wyandotte, Corp.*, 674 So.2d 349, 354 (La.App. 1st Cir. 1996).

The Louisiana rule has two well recognized exceptions: 1) the principal may not avoid liability for injuries resulting from an ultrahazardous activity by hiring out the work to an independent contractor; and 2) the principal may not avoid liability when the principal reserves the right to supervise or control the work of the independent contractor, or gives express or implied authorization to an unsafe practice. *Williams v. Gervais F. Favrot, Co.*, 499 So.2d 623, 625 (La.App. 4 Cir.1986); *Ewell v. Petro Processors of Louisiana, Inc.*, 364 So.2d 604, 608-09 (La.App. 1st Cir.1978), *writ denied*, 366 So.2d 575 (La.1979); *Rock v. American Const. Co.*, 120 La. 831, 45 So. 741 (1908); *Davie v. Levy*, 39 La.Ann. 551, 2 So. 395, 4 Am.St.Rep. 225 (1887); *Alexander v. Lowes Companies*, 701 So.2d 239, 242 (La.App. 1 Cir.,1997).

Part of the second exception in Louisiana is the implied or expressed authorization. Under this exception the principal is liable for the negligence of an independent contractor when the principal gives express or implied authorization to an unsafe practice. *Sandbom, supra*, 674 So.2d at 354; *Thompson v. PetroUnited Terminals, Inc.*, 536 So.2d 504 (La.App. 1st Cir.1988), *writs denied*, 537 So.2d 212, 213 (La.1989); Williams, supra; *Ewell, supra,*

364 So.2d at 606- 607. This second part of the second exception assumes the status and imposes liability in spite of status. *Sandbom,* 674 So.2d at 354. The USA not only authorized but directed the petitioner to proceed without replacing the defective locking ring.

In the present case, the petitioner's employer was hired to change some tires. During the course of performing these contractual duties a hazardous condition was identified that needed to be corrected: the corrosion of part of the rim, specifically the locking ring. As a result the proper way to proceed was the replace the entire rim. However, this was not part of the contracted duties. The USA was the only one with the authority to replace the rim. The petitioner gave notice to the USA of the hazardous condition and requested authorization to replace the rim. The USA refused to purchase the rim and told the petitioner to proceed. This is equivalent to hiring an independent contractor and telling their employees to perform the contracted duties with one arm tied behind their backs. Then when an accident happens to claim immunity on the basis that they hired an independent contractor to do the job.

Under both of the above considerations, the USA is always liable for its own employees' acts of negligence. In deciding the present case, the Fifth Circuit relied on its earlier ruling in *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548 (5th Cir. 1987) in support of its position that USA cannot be held liable for the acts of the independent contractor. However, the Court in *Ainsworth* refused to

allow a claim against a principal to go forward in part because the principal "did not affirmatively create a hazardous situation by requiring [the plaintiff] to use dangerous equipment or methods." *Id.* at 551. In the present case, the USA did create a hazardous situation by requiring the Petitioner to reinstall the tire on the defective rim.

Following *Ainsworth*, other cases have limited *Ainsworth* to its facts. In *Seneca v. Phillips Petroleum Co.*, 963 F.2d 762, 765 (5th Cir. 1992) the Court stated:

> Unlike *Ainsworth*, Seneca does not base his claim upon the negligent acts of the subcontractor, but alleges that his harm was caused directly by the negligent acts of Phillips employees. Therefore, *Ainsworth* has no application here.

In *Heavin v. Mobil Exploration and Producing Southeast, Inc.*, 697 F.Supp. 1408 (E.D. La. 1988) the district court also accepted that *Ainsworth* held that principals are not liable for the negligent acts of its independent contractors, but found that *Ainsworth* did not apply because the claims were for the negligence of the principal.

Since the USA is held to the same liability standards as a private citizen, Louisiana negligence law controls the liability of the USA. The liability of a private citizen in Louisiana is based on Louisiana Civil Code article 2315 which provides in part: "A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Louisiana Supreme Court has

addressed the method of determining fault on many occasions:

> Generally, the initial inquiry to determine if a party may be liable under the duty-risk analysis is cause-in-fact. The plaintiff must prove that the alleged defect in the thing was a cause-in-fact of the plaintiff's harm. A party's conduct is a cause-in-fact of the harm if it was a substantial factor in bringing about the harm. For example, the act is a cause-in-fact in bringing about the injury when the harm would not have occurred without it. While a party's conduct does not have to be the sole cause of the harm, it is a necessary antecedent essential to an assessment of liability. Whether an action is the cause-in-fact of the harm is essentially a factual determination that is usually left for the factfinder.
>
> The unreasonable risk of harm criterion is not a simple rule of law. Rather, it is a criterion established by this Court to facilitate the judicial process required by our Code. As such, it becomes the decision maker's duty to decide which risks are encompassed by the codal obligations from the standpoint of justice and social utility.
>
> In attempting to define the test, we have described the unreasonable risk of harm

> criterion as serving as a guide utilized by the decision maker in balancing the likelihood and magnitude of harm against the social utility of the thing. We have cautioned, however, that such a balancing test does not lend itself well to neat, mathematical formulations. In addition, the decision maker must consider a broad range of social and economic factors, including the cost to the defendant of avoiding the harm, as well as the risk and the social utility of the party's conduct at the time of the accident.

Netecke v. State ex rel. DOTD, 747 So.2d 489, 497-98 (La.1999).

One of the first inquiries is whether a duty existed in the specific case.

> In determining whether to impose a duty in a particular situation, the court may consider various moral, social, and economic factors, including whether the imposition of a duty would result in an unmanageable flow of litigation; the ease of association between the plaintiff's harm and the defendant's conduct; the economic impact on society as well as the economic impact on similarly situated parties; the nature of the defendant's activity; moral considerations, particularly victim fault; and precedent as well as the

> direction in which society and its institutions are evolving.

Meany v. Meany, 639 So.2d 229, 233 (La. 7/5/94).

Allowing a principal to hire an independent contractor then limit its ability to safely perform the contracted tasks and then escape liability would lead to numerous accidents and injuries. There needs to be an incentive for principal to allow the work to be performed in a safe a manner as possible. The law as it stands in the Fifth Circuit now can be lead to numerous wrongs.

An example of applying the law to a similar set of facts is as follows: A homeowner hires a roofer to replace the roofing material. The roofer starts the job and learns that a structural support is bad and needs to be replaced before the roof can be safely walked on. The homeowner is notified and a request is made for authority to expand the contract to fix the structural support. The homeowner says he will not pay for any additional work and orders the contractors' employees to proceed. They do so and the roof caves in. The employee of the independent contractor is then placed in the untenable position of proceeding with the unsafe job or creating problems with his employer.

Allowing the Fifth Circuit opinion to stand would allow principal contractors to ignore warnings and request of independent contractors knowing that they, the principals, cannot be held liable. The principals would have no incentive to take extra time or pay a little more to

prevent accidents.

Employees of independent contractors are faced with proceeding with a known unsafe act or walking off the job. The fact that the independent contractor's employees possibly should have walked off the job can be dealt with the comparative negligence statutes provided in Louisiana Civil Code art. 2323.

CONCLUSION

The duty of the USA needs to be clarified in situations where they hire an independent contractor to perform services. The USA cannot be allowed to insulate itself from liability for negligent acts of its own employees just because an independent contractor is involved. When its employee learned that the locking ring was defective and that the only safe way to proceed was to purchase a new rim it was negligent to require the independent contractor's employee to proceed with the defective locking ring.

Respectfully Submitted,

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APPENDIX

APPENDIX A – OPINION OF THE FIFTH CIRCUIT COURT OF APPEAL, FOR THE UNITED STATES DISTRICT COURT OF APPEAL DATED SEPTEMBER 23, 2003

United States Court of Appeals
Fifth Circuit
F I L E D
September 23, 2003
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-303\240
SUMMARY CALENDAR

RONALD DAVIS
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA
Defendant-Appellee

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division
(01-CV-177-N)

Appendix A

Before REYNALDO G. GARZA, DAVIS, and BARKSDALE, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

In this appeal we review the district court's decision to grant the motion for summary judgment filed by Defendant-Appellee, the United States of America, in the Federal Tort Claims Act suit by Plaintiff-Appellant, Ronald Davis (hereinafter, "Davis"). For the following reasons, we affirm the district court's decision. [2]

I.

FACTUAL AND PROCEDURAL BACKGROUND

Davis was employed by Fleet Tire Service (hereinafter, "Fleet") as a tire service and repair man. He was injured while replacing tires on a Navy truck at the Naval Air Station, Joint Reserve Base in Belle Chase, Louisiana. Davis's work was to be performed pursuant to a contract between Fleet and the Navy.

After inspecting the truck on which the work was to be done, Davis advised a Navy service manager that one of the tires was on a defective rim and could not be replaced. The Navy service manager informed Davis that the Navy would not buy a new rim because the truck was being sold.

---

1. Pursuant to 5th Cir. R.47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

After consulting with his supervisor at Fleet, Davis attempted to install a tire on the defective rim and was injured when the rim broke and hit him in the head.

The United States filed a motion for summary judgment, claiming that, under Louisiana tort law, the Navy service manager did not breach any duty owed to Davis. Davis argued that there are genuine issues of material fact concerning the extent of the Navy service managers' knowledge of the danger inherent in the situation and the government's control over the decision to install the tire on the defective rim. The district court granted the United States' motion, finding that the Navy service manager had not acted negligently toward Davis.

II.
STANDARD OF REVIEW

We review an appeal from summary judgment *de novo*, examining the evidence in the light most favorable to the nonmovant. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 276 (5th Cir. 1992). Summary judgment is proper when there is no genuine issue as to any material [3] fact and the moving party is entitled to a judgment as a matter of law. *Amburgey v. Cohart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991); FED. R. CIV. P. 56(c). Merely alleging a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *Fraire v. City Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992).

III.

NEGLIGENCE

Davis claims the Navy service manager was negligent by refusing to purchase a new tire rim and by authorizing the dangerous installation technique by which Davis was injured. The United States contends that Davis's supervisor at Fleet, Frank LaBarre, made the decision that Davis should attempt to install the tire on the defective rim after conferring with Davis, who told LaBarre that the task could be accomplished. The United States also denies that the Navy service manager had a duty to purchase a new tire rim.

The United States has waived its sovereign immunity for the negligent acts of its employees, provided they were acting within the scope of their office or employment. 28 U.S.C. § 1346(b); *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995). When a government employee's actions are within the scope of their employment, the United States' tort liability is determined by the laws of the state in which the act occurred. 28 U.S.C. § 2674; *Skipper v. United States*, 1 F.3d 349, 352 (5th Cir. 1993).

In Louisiana, a principal is generally not liable for the tortious acts committed by an independent contractor while the contractor is performing their contractual tasks. *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548, 549 (5th Cir. 1987); *Hawkins v. Evans Cooperage Co.*; 766 F.2d 904, 906 (5th Cir. 1985). One exception to this general rule is that a principal may be liable [4] for the negligent acts of an independent contractor when the principal exercises

control over the independent contractor. Ainsworth, 829 F.2d at 550. While Davis claims that the Navy service manager exercised control over the changing of the tire and authorized Davis's use of an unsafe procedure to install a tire on the defective rim, the record clearly indicates otherwise. Even if the Navy service manager was aware that Davis was using an unsafe procedure to install the tire, Louisiana does not impose a duty on a principal to intercede in an independent contractor's decision of how to perform their work. Id. at 551.

When Davis informed the Navy service manager that the tire rim was defective and the manager refused to buy a new tire rim, Davis called his supervisor at Fleet, LaBarre. Davis told LaBarre that he thought he could successfully install the tire, despite the defective rim, using three pairs of pliers. It was LaBarre who instructed Davis to use a dangerous procedure to install the tire. The Navy service manager was not present when Davis attempted the procedure and there is no evidence that he even knew Davis was attempting to install the tire on the defective rim. The Navy service manager had no actual or implicit control over Davis. Thus, the United States cannot be held liable for Davis's actions.

IV.
CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED JANUARY 6, 2003

FILED
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EASTERN DISTRICT OF LA
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD DAVIS CIVIL ACTION

VERUS NO: 01-177

UNITED STATES OF AMERICA SECTION: "N"(3)

JUDGMENT

For the reasons set forth in the court's order dated December 31, 2002; accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant, United States of America, and against Ronald Davis, dismissing plaintiff's complaint with prejudice.

Appendix B

New Orleans, Louisiana, this 6th day of January, 2003.

S/ Kurt D. Engelhardt
KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY
JAN 6 2002

APPENDIX C – ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED JANUARY 2, 2003

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD DAVIS — CIVIL ACTION

VERUS — NO: 01-0177

UNITED STATES OF AMERICA — SECTION: "N"

ORDER AND REASONS

Before the Court is a Motion for Summary Judgment, filed by the United States. For the reasons that follow, the motion is GRANTED.

I. BACKGROUND

Plaintiff, Ronald Davis, is an employee of Fleet Tire Service, Inc. ("Fleet"), a tire service and repair company. On January 18, 1995, the United States Navy

requested that Fleet change four large Michelin tires on a crash truck at the Naval Air Station, Joint Reserve Base ("JRB") in Belle Chase, Louisiana. Fleet assigned the job to Davis, asenior repairman with more than twenty-one years experience in dismounting, repairing, and remounting tires on a variety of vehicles, including buses, 18-wheelers, and heavy equipment. Six or seven months earlier, Davis had mounted these same four tires on this very same truck. *See* Davis Depo, Def. Exh. A, at 31. Because the Navy was now preparing to sell or trade in the truck, it wanted to replace theses newer tires with older ones.

On the morning of January 19, 1995, Davis took his truck, tools, and a helper to the JRB. After removing the third tire from its rim, Davis discovered that a "lock-ring" – [2] a component of the rim – was corroded. *Id.* at 33-34. Davis went to the office of the Navy's Service Manager and told him about the lock-ring. *Id.* at 35, 39. The Service Manager said that the truck "was leaving" and that the Navy "wasn't going to buy another wheel." *Id.* at 35, 50. Davis left the office, went to his truck, and called is boss, Frank Labarre. *Id.* at 35, 49-50. Labarre told Davis to "do what [h]e had to do" and to "use the pliers to lock it [the ring] down." *Id.* at 35, 43. Davis did not see or speak with the Service Manger again. Instead, "thinking that [they] could make it work," Davis proceeded back to the

---

1. According to plaintiff, lock-rings are not sold separately. To replace them, one must buy an entire wheel. *See* Davis Depo, Def. Exh. A, at 35-36.

crash truck to do as Labarre had instructed. Davis and his helper began adding air to the tire, while holding the lock-ring with pliers. When the air reached sixty pounds, the lock-ring came loose and struck Davis in the head. *Id.* at 46-47. Davis filed an administrative claim with the Navy and then filed this action under the Federal Tort Claims Act ("FTCA").

II. LAW AND ANALYSIS

The government argues that it is entitled to judgment as a matter of law because: (1) plaintiff cannot prove negligence on the part of any Navy employee; and (2) the United States has not waived its sovereign immunity for recovery under any other theory. The Court agrees.

A. Summary Judgment Standard:

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Kee v. City of Rowlett, Texas*, 247 F.3d 206, 210 (5th Cir.)(quoting *Celotex Corp. v.* [3] *Catrett*, 477 U.S. 317, 322 (1986)(quoting Fed. R. Civ. P. 56(c))), *cert. denied*, 122 S.Ct. 210 (2001). "The moving party bears the burden of showing . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 210. If the moving party meets this burden, "the nonmovant must go beyond the pleadings and designate

specific facts showing that there is a genuine issue for trial." *Id.* "A dispute over a material fact is genuine if the evidence is such that a jury reasonably could return a verdict for the nonmoving party." *Id.* (Internal quotations omitted). "The substantive law determines which facts are material." *Id.* at 211.

B. Waiver of Sovereign Immunity Under the FTCA:

The FTCA "waives the United States' sovereign immunity for the torts of federal employees by granting the federal district courts jurisdiction over suits for damages 'caused by the gegligent or wrongful act or omission of any employee of the Government . . .'" *Aretz v. United States*, 604 F.2d 417, 426 (5th Cir. 1979)(quoting 28 U.S.C. § 1346(b)). "The Act also limits the United States' liability in certain respects." *Id.* First, to fall within the FTCA's waiver of sovereign immunity, the employee in question "must be [an] employee[] of a "federal agency."" *Id.* (Citing 28 U.S.C. § 2671). The Act's definition of "federal agency" specifically provides that the term "'does not include any contractor with the United States.'" *Id.* (quoting 28 U.S.C. § 2671). Thus, the Act "precludes federal liability for the torts of an independent contractor." *Id.*

Second, "[t]he liability of the United States under the Act is limited . . . to the 'negligent or wrongful' acts of its employees." *Id.* at 426-27 (quoting 28 U.S.C. § 1346(b)). "[T]his language has been interpreted to preclude liability of the United States based on strict liability in tort." *Id.* (citing *Laird v. Nelms*, 406 U.S. 797

(1972)). These limitations "foreclose[] any theory of liability . . . based on some nondelegable duty of the employer of an [4] independent contractor." *Id.*; see also *Conner v. United States*, 967 F. Supp. 894, 902-03 (M.D. La. 1997)(FTCA does not allow United States to be held liable for acts of independent contractor based on Louisiana law theory that the government, as principal, retained a nondelegable duty to see that work was done safely.). Thus, in cases such as this one, where work has been performed by an independent contractor, the United States may be held liable only for "its own employees' independent acts of negligence." *Aretz*, 604 F.2d at 427 (emphasis added).

C. Negligence Under Louisiana Law:

Louisiana law governs plaintiff's negligence claim in this case. *See* 28 U.S.C. § 1346(b)(1)(in determining whether employee's act or omission was wrongful or negligent, court looks to "the law of the place where the act or omission occurred"). To establish negligence under Louisiana law, a plaintiff "must prove that the defendant's conduct was a cause-in-fact of the plaintiff's harm; that the defendant owned a duty of care to protect against the risk involved; that the defendant breached the duty; and that actual damages resulted from that breach." *Darlone v. Louisiana Power & Light Co.*, 763 So.2d 779, 784-85 (La.

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2. Plaintiff does not dispute that Fleet is an independent contractor. See, e.g., Opp. Memo at P.20 ("plaintiff is not arguing that the Navy maintained operation control").

App. 2d Cir. 2000)(citing *Harris v. Pizza Hut of Louisiana, Inc.* 455 So.2d 1364, 1370 (La. 1984)). "Duty is a question of law." *Id.*

Plaintiff argues that JRB Service Manager was negligent in refusing to buy a new wheel and telling Davis that he wanted the tire changed despite the corroded lock-ring. [5] Plaintiff has cited and the Court can find no basis in fact or law for imposing on a customer a legal duty to

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3. It is unclear from Davis' deposition testimony whether the Service Manager actually stated that Davis should replace the tire anyway or whether Davis simply inferred this from the Service Manager's statement that he was not going to buy a new wheel. When asked specifically what the Service Manager said, Davis' response suggested the latter. See Davis Depo, Def. Exh. A, at 50 (A: What did the service manager tell you, if you remember? What did he tell you when you told him that you thought the lock ring was bad? What did he say? A: Well, all I heard was next [sic] was that the machine was leaving, that they wasn't going to buy another wheel.); see also id. at 35 (Q: So, you knew the lock ring was bad and you told the service manager that it was bad. What happened then? A: Well, after he said he wasn't getting another wheel, so [sic] I called my job. That's when my boss told me to do what we had to do.). In response to a leading question, however, Davis agreed that the Service Manager told him to replace the tire anyway. See id at 36 (Q: So, did the service manager tell yo you had to do it anyway? I mean, is that what happened? A: Right.). For purposes of this motion, the Court has assumed that the Service Manager told Davis both that he would not buy a new wheel and that he wanted the tire replaced anyway.

purchase (or authorize the purchase of) a thing. As even plaintiff concedes, "if the Navy did not wish to incur this expense [of a new wheel], it could simply have left the one new tire in place." Opp. Memo at p. 9. This leaves the Service Manager's alleged instruction request that Davis replace the tire anyway, despite the corroded part. *See supra* note 3.

Although plaintiff does not contend that he told the Service Manager about the specific risks of proceeding with a corroded lock-ring, he argues that the Service Manager should have known the risks given the Navy's experience in changing tires. Assuming this to be true, however, plaintiff has not established a genuine issue regarding any act of independent negligence by the Service Manager, as required under the FTCA. Plaintiff has presented no evidence disputing that Fleet, not the Navy, maintained operational control throughout the tire changing process. See, e.g., Opp. Memo at p. 20 ("plaintiff is not arguing that the Navy maintained operation control"). Indeed, plaintiff in his deposition testimony conceded that his boss, Frank Labarre, was "the only one that [could] make that decision" to proceed. See Davis Depo, Def. Exh. A, at 37. Plaintiff admits that, except for the Service Manager's alleged [6] response to Davis' statements about the lock-ring, the Service Manager did not watch them, did not supervise their work, and did nto tell them how to do their job. See Statement of Contested Facts at p.4. Moreover, plaintiff does not contend and presents no evidence that the Service Manager instructed plaintiff regarding how he should go about

replacing the tire given the existence of a corroded lock-ring. It is undisputed that these decisions were made entirely by Davis and/or his boss and carried out exclusively by Davis and his helper. There is not evidence that the Service Manager was even told about Fleet's plan for addressing the lock-ring, much less that he acquiesced in it. Imposing liability under these circumstances would require a holding that despite hiring an independent contractor, the Navy and/or its Service Manager retained a non-delegable duty to see that work was done safely. Such a result is contrary to the FTCA. See Aretz, 604 F.2d at 427; Conner, 967 F. Supp. at 903.

III. CONCLUSION

Accordingly, for the foregoing reasons, IT IS ORDERED that the government's Motion for Summary Judgment is Granted.

New Orleans, Louisiana, this 31st day of December 2002.

s/ Kurt d. Englehardt

KURT D. ENGELHARDT
UNITED STATES DISTRICT JUDGE